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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952 A. D.

No. 370

JOHN TISHEROS,

Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinion Below.

The opinion of the Court of Appeals for the Seventh Circuit (Supp. Tr. 9-12) is reported at 197 F. 2d. 466 (C. A. 7th 1952). The United States District Court rendered no reported opinion.

Jurisdiction.

The jurisdiction of this Court is adquately stated in the petition (Ptn. 4).

Questions Presented.

Petitioner's "question presented" (Ptn. 4) ignores the fact that several issues were presented to the Court of Appeals, which only decided one of them. In addition to the question presented by petitioner, respondent also preserved the question of whether or not ice on the steps of a locomotive was an "unnecessary peril" (Tr. 81, Supp. Tr. 9). Accordingly, the questions presented by petition are as follows:

(1) Whether a locomotive standing by itself in a roundhouse stall between trips is being "used on" a railroad's "line" under the Boiler Inspection Act (U. S. C., Title 45 Sec. 23)?

(2) Whether ice upon the steps and grab irons of a locomotive which has just entered the roundhouse after traveling from Omaha, Nebraska to Chicago, Illinois, in sub-freezing weather is an "*unnecessary* peril to life or limb", within the ban of the Boiler Inspection Act (U. S. C., Title 45, Sec. 23)?

Statute Involved.

The statute involved is Section 2 of the Boiler Inspection Act of 1911 (36 Stat. 913), as amended March 4, 1915 (38 Stat. 1192), and June 7, 1924 (43 Stat. 659). The present text of this statute (U. S. C., Title 45, Sec. 23) appears at page 8 of the petition.

Statement of the Case.

The petition seeks review of the reversal of a judgment for the petitioner in an action under the Boiler Inspection Act to recover damages for injuries sustained by him on March 9, 1950 while employed by respondent as a "fire knocker" in respondent's roundhouse.

Petitioner had been employed in repondent's Galena roundhouse for almost twenty- five years (Tr. 27), where it was his job to service engines (Tr. 57). When the engines were to remain in the roundhouse for only a short time it was petitioner's duty to climb up into the cab, open the fire box door, shovel in coal, and keep up the fire. It was also his job on such engines to "fix up the water" (Tr. 29). With respect to such engines he was required to see that they were ready to go out on the run. He stated that unless he did his job, the engine could not go out on its run (Tr. 44). Where an engine was not to be used for some time, it was petitioner's duty to knock out the fire (Tr. 44). Petitioner's work was performed while the engine was standing in a stall in the roundhouse. No one directed him, as he knew what his job was—to build the fire up or to knock it out (Tr. 44).

About 4:20 a.m. on the morning of March 9, 1950, engine No. 3031, which had just come in from Omaha, Nebraska, was placed in stall No. 32 at the Galena roundhouse. About ten minutes thereafter petitioner, who had received no specific instructions with respect to this locomotive, went to it to see whether or not it had a fire in it, and, if so, to fix up the fire and the water (Tr. 27-29). As petitioner reached the steps of the locomotive he noticed that the steps were icy, having about two inches of ice on the sides and some ice in the center. The

ice was a mixture of old and new ice, because the engine had traveled all the way from Omaha (Tr. 30-31). The weather at this time was cold and it was consequently usual for engines to come in with ice on them under those circumstances (Tr. 42-43). There is no mention in the record of whether petitioner was to build up or knock out the fire on engine No. 3031[1].

In order to perform his duties on engine No. 3031 petitioner attempted to climb the steps of the engine on the fireman's side. On the third or fourth step from the bottom he slipped and fell because of the ice on the steps and grab irons (Tr. 33). At the time petitioner was the only person in the vicinity of engine No. 3031 (Tr. 32). There is no evidence as to the whereabouts of the engineer, fireman, or hostler of engine No. 3031, but it is certain they were not in the vicinity of the engine.

The subsequent movements of engine No. 3031 are well stated in the opinion of the Court of Appeals, as follows (Supp Tr. 10):

> "The record is silent as to the exact time the locomotive left the roundhouse. We do know, however, that sometime after the accident, on the same day, it was inspected, and that, later in the day it was

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1 Petitioner states that his job with respect to engine #3031 was to see that a fire was burning and not to knock out such a fire (Ptn. 4). Petitioner endeavors to draw this inference from page 29 of the transcript. It is to be noted that petitioner said that if the locomotive had a fire in it he was to fix it up, and on cross examination (Tr. 44), in response to a question concerning what his job was when "this" locomotive came off the road, petitioner answered: "No, when the engine came in off the road, I had to keep the fire up. If they didn't have to use it, I knock the fire out". At no other place in the record was petitioner specific as to his function with respect to this particular locomotive.

taken to the yards, and about 8 P.M. started for Clinton, Iowa, to pick up an east-bound freight."[2]

At the close of petitioner's case respondent moved for a directed verdict and upon its denial stood upon its motion. The case was submitted to the jury, which returned a verdict for petitioner in the amount of $42,000 (Tr. 23, 71). Thereafter respondent moved for judgment notwithstanding the verdict, for a remittitur, or for a new trial (Tr. 72-76), which were denied.

In the Court of Appeals, respondent contended, among other points, that the locomotive, having been loged in the round-house stall, was not in use "on its line" and that the ice on the steps and grab irons, under the facts disclosed by the record, did not constitute "unnecessary peril" (Tr. 81, Supp. Tr. 10). The Court of Appeals for the Seventh Circuit held that the locomotive involved was not being used on respondent's line, as required by the Boiler Inspection Act, and, therefore, found it unnecessary consider the other contention (Supp. Tr. 10).

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[2] Petitioner contends that the jury was justified in assuming that the locomotive "resumed its journey" very shortly after petitioner was injured (Ptn. 3, Fn. 1). Petitioner's basis for this is the failure on the part of the respondent to introduce evidence of the time the locomotive left. However, the precedent there cited is applicable where the case is submitted to the jury upon evidence for both sides. In this cause, however, respondent filed a motion for a directed verdict at the close of the petitioner's evidence (Tr. 22), and upon the denial of said motion elected to stand on its motion, the case being submitted to the jury only upon the evidence adduced by the petitioner (Tr. 23). Respondents appeal tested the sufficiency of plaintiff's prima facie case; under these circumstances the claimed presumption does not arise, Condon v. Schoenfield, 214 Ill. 226 (1905); Hutcheson v. Savings Bank of Richmond, 129 Va. 281, 105 S.E. 677 (1921); Stimpson v. Hunter, 234 Mass. 61, 125 N.E. 155 (1919); Loper v. Askin, 178 App. Div. 163, 164 N.Y.S. 1036 (1917).

ARGUMENT.

I.

The Court of Appeals correctly held that respondent's locomotive was not in use on respondent's line while sitting in the roundhouse between trips.

The simple question here presented is whether or not respondent's locomotive was in use on its line at the time of the accident. Petitioner has sought to obscure this simple question of the application of the Boiler Inspection Act to an undisputed set of particular facts and cover his failure of proof as to this issue by characterizing the status of respondent's locomotive as under "temporary detention * * * until the time scheduled for its resumption of motion in interstate commerce" (Ptn. 1, 4, 9, 16,) an interpretation not "conceded" by anyone but petitioner himself (Ptn. 19). The proof shows that the locomotive commenced its run near Omaha Nebraska, and ended its run in Chicago at the Galena Roundhouse. On its way to the Galena roundhouse the engine had to pass through Proviso, Illinois, about six miles west of the city limits of Chicago. After completion of the run from Omaha to Chicago, locomotive No. 3031 was placed in the Galena roundhouse for servicing and to get it out of the way of other traffic until its next scheduled run (Tr. 55). The next trip for this locomotive was in the opposite direction, i. e., westbound to Proviso through which it had earlier passed (Tr. 12). Petitioner was injured while in the performance of his duties as a "fire knocker". The record is silent as to whether he was to

fire up or knock out the fire on locomotive No. 3031. The record is also silent as when locomotive No. 3031 left the roundhouse for Proviso, but it is certain that it was sometime later in the same day. Respondent contends, and the Court of Appeals held, that there was no evidence from which a jury could find that locomotive No. 3031, standing by itself in a stall in the roundhouse at a terminal point, and unaccompanied by any member of the crew who operated it, was in use on respondent's line.

The language of the Boiler Inspection Act (U. S. C., Title 45, Sec. 23) clearly indicates an intent to make "use on the line" relate to "active" use in the business of respondent, and not to equipment being held for future use. We submit that it could no more rationally be said that the phrase "used on its line" included standing idle in a roundhouse than it could be said that a motorist is using his car while it is standing in a garage behind his house. Moreover, it is a well accepted canon of statutory construction that the entire statute must be construed together. In this instance there is no necessity to look further than the same section for conclusive support of respondent's position. There the purpose of the act is expressed by Congress in the following language:

> " • • • that the same may be employed in the *active* service of such carrier without unnecessary peril to life or limb • • • " (Emphasis supplied.)

The Act was obviously intended to protect employees against defective equipment in use in *active service*, not in a roundhouse where locomotives are customarily put away.

The opinion of the Court of Appeals in this case indicates a clear appreciation of this provision when it analyzes the facts in this case (Supp. Tr. 11):

"The engine had reached the yards and there ended its run. The engineer and fireman had left, and the engine, idle and not in operation, had been placed in a stall in the roundhouse. Plaintiff then started to perform his duty,—build up the fire or 'knock' it out. He was the only employee on or about the idle and inactive locomotive. Certainly it can not be said that in such a situation the engine was in use on defendant's line."

The Court of Appeals correctly felt that it had dealt with the same problem in *Lyle* v. *Atchison, Topeka & Santa Fe Ry. Co.* 177 F. 2d 221 (C.A. 7th, 1950), *cert. den.* 339 U. S. 913. That case involved a suit for personal injuries by a "hostler's helper" whose job consisted of servicing locomotives to prepare them for use on the railroad. In the accident there involved the surface of the locomotive was wet because of mist. After it came off the road, the locomotive was driven by the hostler to the inspection pit where the hostler left it for plaintiff to work on. After plaintiff had completed his work at the inspection pit, he climbed to the top of the tender to retrieve a pail, and, in descending, slipped.

It is to be noted, in passing, that the locomotive involved in the *Lyle* case was not as completely removed from service on the line as is the locomotive in this case. There the locomotive was on its way through a routine of maintenance. Here the locomotive was merely standing in a roundhouse stall.

The Court, in determining that the locomotive was not in use within the meaning of the Boiler Inspection Act, relied on the fact that the operating crew had left (also true in this case), that the engine was on the service track in the roundhouse (in this case the engine

was at its ultimate destination, a roundhouse stall), and that the activities of plaintiff were preparing the engine to be in readiness for future use on another run (identical to the testimony of petitioner in this case). There is no showing in the *Lyle* case as to whether that engine did in fact leave on another run.

The Court of Appeals explained the meaning of the Boiler Inspection Act as follows, at page 222:

> "Liability under the Act in question, like that under the Safety Appliance Act, 45 U.S.C.A. Sec. 1 et seq., depends not upon negligence but is an absolute one to obey the statutory requirements. For this reason Congress, obviously, in framing each of the Acts, in consideration of the unconditional duty to have cars and locomotives in such condition as not to put in peril life or limb while in use imposed upon the carrier, likewise limited the absolute liability to cars and locomotives while in use 'on the line'. In other words, when a locomotive or car is in 'use on the line,' the mandatory duty of the carrier attaches and when the car or engine is not so in use then the duty under the express provision of the statute does not exist."

The Court then applied the law there stated to the facts as follows:

> "The simple question is, was the locomotive in use? To that question, we think, there can be but one answer. Clearly the use of the engine in transportation had for the time being been abandoned; its use in commerce had come to an end. Its operator had turned it over to the round-house employees, the hostler had taken charge and moved it to the inspection pit at the round-house and there turned it over to plaintiff whose duty it was to make the service and to prepare the engine for future further use. If grease and oil or other for-

> eign matter were improperly on the locomotive, it was his duty to remove it if possible and, if not, to report it. It is opposed to reality to say that under such circumstances the locomotive was in use so that the mandatory duty imposed by the Boiler Inspection Act then applied. To service an engine while it is out of use, to put it in readiness for use, is the antithesis of using it. To apply the mandatory liability in favor of one who puts an engine in readiness for use is to enlarge and extend the intent of Congress in enacting the legislation."

Although respondent is conscious that this Court has repeatedly stated that no opinion as to the correctness of the decision may be inferred from the denial of certiorari, it is interesting to note that the petition for certiorari in the *Lyle* case proceeded closely along the lines of the instant petition, and that the decision was handed down in 1950, well after this Court had embarked upon and completed its clarification of the Federal Employers' Liability Act and related Safety Appliance Act and Boiler Inspection Act, summarized and commented upon in *Wilkerson* v. *McCarthy*, 336 U. S. 53 (1949).

Petitioner first vainly attempts to distinguish the *Lyle* case and then in desperation urges that it be overruled by this Court (Ptn. 17-19). Petitioner distinguishes the *Lyle* case on the ground that the record in that case contained no showing of subsequent use. That petitioner does not seriously give credence to this basis of distinction may be inferred from the fact that elsewhere petitioner takes great pains to convince this Court that the stay of engine No. 3031 in the Galena roundhouse was merely a temporary detention during the course of one trip. Actually, under the rationale of the *Lyle* case, and within the policy of the Boiler Inspec-

tion Act, each trip constitutes a separate "use on the line" and the time interval between uses is insignificant.

Petitioner next attempts to support his position by the citation of *Cusson* v. *Canadian Pac. Ry. Co.*, 115 F. 2d 430 (C. A., 2d 1940). In that case plaintiff climbed over a Delaware freight car to a Boston & Maine freight car to release the handbrakes preparatory to uncoupling the two cars. The brakes on the Delaware car did not hold and plaintiff testified that he was ordered to jump to the Delaware car to set its brakes. He climbed to the roof of the Boston & Maine car and prepared to board the Delaware car, but as the Delaware car was at that time too far away he tried to stop himself. In so doing he slipped on frost covering the top of the Boston & Maine car. One of the contentions of the defendant in that case was that the car was not in use within the meaning of the Safety Appliance Act. It is apparent from Judge Hand's language at page 432 of the opinion that there was some ambiguity in defendant's argument. Judge Hand first concludes that it is possible both railroads were using the Delaware car and consequently the brake thereof. The failure of this brake was the cause of plaintiff's accident. All the language quoted in the petition (Ptn. 17) refers to is the argument that the use of the brake, an appurtenance to the car was not a use of the car. Respondent does not contend that the use of grab irons and steps by petitioner was not a use of the locomotive. The crucial question is whether respondent was using the locomotive *on its line* at the time of the accident. Petitioner's citation of the *Cusson* case does not go to that point, and therefore is not, despite petitioner's protestations (Ptn. 6), in conflict with the decision in this case.

Petitioner then argues that the *Lyle* case should be overruled. He alleges that to sustain the *Lyle* case will give rise to uncertainty among injured railroad employees as to their rights of recovery. This is not true. As the Court correctly pointed out in the *Lyle* case, effect must be given to the limitations placed by Congress upon the liability imposed under the Boiler Inspection Act.

> "Remembering that the liability under the Act is absolute, that the circumstances under which liability attaches is accordingly limited to the words that the Congress has employed in defining those limited circumstances, it seems clear to us that there is but one answer to the question presented and that is that the locomotive in question was not in use within the meaning of the Boiler Inspection Act at the time of the injury. Consequently plaintiff failed to make out a prima facie case." (223.)

That Congress intended a limitation of that act to the active operations of a railroad is clear from our discussion of the phraseology of the statute. The *Lyle* case, the opinions hereinafter cited interpreting the Boiler Inspection Act, and the opinion in the instant case all enunciate a general principle of law applied with precision to determine the limits of use under that act. To rule as petitioner contends would be to further confuse the question of when use on the line ends, give rise to continuing litigation in this Court based merely on questions of fact, and disregard the clear intent of Congress. Petitioner, moreover, would have this Court believe that the holding in the *Lyle* case was an isolated aberration and a new departure in the judicial construction of the Boiler Inspection Act. Actually the *Lyle* case represents one of a series of cases under that Act and the related Safety Appliance Act, many of which this Court has refused to hear on petition for certiorari.

Flack v. Atchison, T. & S. F. Ry. Co., 285 Mo. 28, 224 S.W. 415, (1920) cert. den. 256 U. S. 690 (1921).

Plaintiff's intestate was employed as a boilermaker working on a locomotive which was being made ready to leave the roundhouse. In denying liability under the Boiler Inspection Act for injuries sustained during the course of his work, the Court said, at page 423:

> "At the time of the accident here in suit, the engine in question was not being used in 'moving interstate or foreign traffic,' nor was it 'in the active service of such carrier in moving traffic' within the intent and purpose of that act, as we construe it. The engine was undeniably being prepared for use in interstate traffic, and the deceased met his death while engaged in that preparation."

The *Flack* case is more extreme on the point of subsequent use, the distinction endeavored to be made by petition of the *Lyle* case, than the present case. Here locomotive No. 3031 was merely being held in the roundhouse to depart at a future time. In the *Flack* case the locomotive was being readied for immediately impending use.

Brady v. Wabash Ry. Co., 329 Mo. 1123, 49 S.W. 2d 24 (1932) cert. den. 287 U. S. 619 (1932).

Plaintiff was inspecting a box car preparatory to its transfer from the tracks of the defendant to the tracks of the Terminal Railroad Association. Plaintiff's cause of action was based on the requirement of the Safety Appliance Act that railroads provide and maintain secure handholds on the roofs of their cars. The question before the Court was whether or not during the inspection process the car involved was in use on the defendant's line. In passing upon this question the Court stated, at page 28:

> "The decided cases, however, hold that the defective car must be in actual use by the defendant at

the time of the injury in order to be within the provisions of the Safety Appliance Act. There is a difference in this respect between the requirements of the Safety Appliance Act and the Federal Employers' Liability Act (45 USCA Secs. 51-59), in that liability under the Safety Appliance Act is not based on negligence, nor is it required that either the person injured be engaged in or the offending car be at the time used in, interstate commerce. What is required is that the defendant be a carrier or highway of interstate commerce, and that it be hauling or actually using at the time on its line a car defective as to the safety appliances covered by the act."

Harlan v. Wabash Ry. Co., 335 Mo. 414, 73 S.W. 2d 749 (1934).

The plaintiff was injured when he fell through the trap door of a locomotive being prepared for an interstate run while the train was being made up on a track in the defendant's yard. In that case the Court followed its earlier opinion in the *Brady* case. However, there were no minor repairs being made to the locomotive at the time of the accident involved in the *Harlan* case.

Baltimore and Ohio R. Co. v. Hooven, 297 Fed. 919 (C. A. 6th, 1924).

Plaintiff brought suit under the Safety Appliance Act to recover for injuries sustained on a locomotive in the roundhouse for its regular monthly inspection and for running repairs. At the time of the accident the engine was about ready for service and was sent out on the road shortly thereafter. The Court of Appeals, holding that there was no evidence bringing the plaintiff within the scope of the Safety Appliance Act, stated with respect to the term "use", at page 922:

"The act forbids the 'use' or 'hauling on its line' of prescribed cars. Whatever ambiguity lies in the statute results from the susceptibility of the term

'use' to an interpretation equivalent in meaning to the terms 'employ' or 'engage,' or the phrase 'habitually use,' as distinguished from the term 'use' as implying actual present use. Having in mind the broad aims and purpose of the statute and its specific provisions, we think there can be no doubt as to the meaning of its prohibitory clause. The statute imposes an absolute liability on the carrier to equip its vehicles with safety appliances and to keep such appliances secure. The act of equipping the vehicle originally with the safety appliances and the act of repairing an appliance which becomes defective in use are acts in compliance with and not in violation of law, and are not in our judgment acts which the law intends to penalize."

The Court comments, at page 923, that the Boiler Inspection Act imposes the same degree of liability for the same reasons. The Court then concludes that civil liability was not extended to the time when the car was stationary. Finally, the Court indicates its clear belief that "use on the line" did not extend to cars at rest in the yard, saying, at page 924:

"Another feature of the prohibitory clause of the statute must not be overlooked. The statute forbids the carier to haul or permit to be hauled or used *on its line* any car, etc. It was indicated by this court in *McCalmont* v. *Pennsylvania Railroad Co.*, 283 Fed. 736, though not as a basis for decision, that it might well be thought that the prohibition did not apply at all to merely yard movements, citing *Louisville & Jeffersonville Bridge Co.*, v. *United States*, 249 U.S. 534, 39 Sup. Ct. 355, 63 L. Ed. 757. While there may be some indication (*Texas Railway* v. *Rigsby, supra*) that intermediate shiftings at the repair point yard are part of the unitary journey of the car from the point where the defect is discovered to the place of actual repair, there are no cases from which any holding may be inferred to the effect that a car at rest at the repair point and not in relation to move-

ment of other cars, is a part of such unitary movement as is covered by the exception to the proviso in section 4 of the 1910 amendment."

McCalmont v. Pennsylvania R. Co., 283 Fed. 736 (C.A. 6th 1922) cert. den. 260 U. S. 751 (1922).

Plaintiff's decedent, a car inspector, was killed while adjusting a coupling on a defective car which was standing at rest on a storage track waiting to be transported to the shop for repairs. Liability was predicated upon the coupling defect for which the car had been placed upon the dead track. Holding that the car was not used on the line, within the meaning of the Safety Appliance Act, the Court said, at page 739:

"In the present case no hauling was in progress or in immediate contemplation. The car was wholly out of present use. The original putting on of the chain and the further adjustment of the chain were in the nature of temporary repairs which would permit the car to be taken to the shop, and, so long as work of this character is not done as a part of the immediate operation of hauling to the shop, it does not seem important whether the expected interval before hauling is a few hours or a much longer time. Fully remembering that the benefits of the act are not confined to those who are actually trying to couple at the moment of the injury, still it does not follow that they extend to one who is merely putting the couplings in condition for a use which, though it may come soon, is distinctly of the future and not of the present."

From the foregoing cases it is clear that the phrase "use on its line" when construed in the light of the purpose of the Act, to maintain the equipment for "active service," does not apply to a situation where a locomotive is standing in a place normally used for storage awaiting a new assignment to another trip. Clearly locomotive No.

3031 in the instant case suited those conditions and the question of when thereafter this locomotive began its trip to Clinton by moving from the Galena roundhouse to Proviso was of no significance. It thus follows that the holding of the Court of Appeals was correct.

Cases cited by Petitioner are Inapplicable.

Petitioner, asserting that this court has made no pronouncements on similar questions under the Boiler Inspection Act, cites a number of cases under the Safety Appliance Act which, he contends, support his position (ptn. 9-16). Some of these cases do not decide the question of "use" and others are merely a different result, obtained by applying the same rule of law to different facts.

A comparison of the Safety Appliance Act (U.S.C. Title 45, Sections 1-16) with the Boiler Inspection Act (U.S.C. Title 45, Sections 22-43) indicates certain differences. In the first place, Sections 1, 2, 4, 5 and 11 of Title 45 contain the prohibitions of the Safety Appliance Act. In none of them is the phrase "active service" used as it is in Section 23 of said Title. Secondly, some of these sections, including Section 4, involved in the *Johnson* case, have an additional requirement that the offending car be used in interstate traffic. We have set forth here in the footnote the facts and reasoning indicating that the question of interstate traffic, rather than use on petitioner's line, was involved in *Johnson* v. *Southern Pacific Co.*, 196 U.S. 1 (1904).[8]

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[8] Plaintiff, in the Johnson case, was head brakeman on a westbound freight. At Promontory, Utah, he was directed to uncouple the engine from the freight and couple it to a dining car standing on the side track, for the purpose of turning it around so that it could be put on a westbound passenger train. The engine and the car had different type couplers, which would not couple automatically as required by Section 2 of Title 45. The major question in the case was

The majority of the cases cited by petitioner are concerned with the fact that in Title 45, Section 13, the civil liability for the haulage of a defective car to a repair point is expressly retained, although the carrier is exempt from the penalty under those circumstances. The question is whether the defective car has reached the repair point. This problem was clearly recognized by the court in *McCalmont* v. *Pennsylvania R. Co.*, 283 Fed. 736 (C.A. 6th, 1922), previously cited by respondent. We set forth in a foot-note the facts and reasoning of the various courts in cases cited by the petitioner to indicate

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whether or not the fact that both the engine and car were equipped with automatic couplers was sufficient compliance under the Act, even though they would not couple automatically. The second question was clearly whether the car was in interstate traffic, not whether it was used on the line, the court noting at page 22:

"Counsel urges that the character of the dining car at the time and place of the injury was local only and could not be changed until the car was actually engaged in interstate movement or being put into a train for such use, and Coe v. Errol, 116 U. S. 517, is cited as supporting that contention. In Coe v. Errol, it was held that certain logs cut in New Hampshire, and hauled to a river in order that they might be transported to Maine, were subject to taxation in the former State before transportation had begun.

The distinction between merchandise which may become an article of interstate commerce, or may not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different States, renders this and like cases inapplicable.

Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic and so within the law."

Examination of the argument for the railroad, defendant in error, appearing at pages 10 to 12 of the report, indicates that the question of use on line was not argued, but the question of interstate commerce or local commerce was extensively argued.

that the same principle of law was applied in each of them, the result differing because of the different facts involved.[4]

Moreover, *Delk* v. *St. Louis & San Francisco R.R. Co.*, 220 U. S. 580, (1911) (ptn. 10), cited by petitioner, does not involve the question of "use on the line" at all. The two points involved in the case were the holding of the Court of Appeals that the duty under the Safety Appliance Act was not absolute (page 586 of the opinion) and the fact that contributory negligence was no longer a defense under the Act. In addition, the *Delk* case involved an accident which took place during a switching operation.

Petitioner finally argues (ptn. 18-19) that had the grab-iron on the locomotive been defective he would have

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[4] Chicago, Great Western Railway Co. v. Schendel, 267 U. S. 287 (1924) (petn. 11), involves entirely different facts from those set forth by the petitioner. A drawbar had pulled out of the coupling on the car involved and the crew had changed the car to the one ahead of it in the train. The train then pulled into a siding for the purpose of dropping the car, and plaintiff's decedent went between the cars for the purpose of disconnecting this chain. As he did so, the defective car went downgrade, thereby crushing plaintiff's decedent. The language cited by petitioner at foot-note 2 (ptn. 11) is not from this case. However, the court said at page 291, indicating that it regarded the uncoupling as still a part of "use", "under the circumstances disclosed we think it clear that the use, movement or hauling of the defective car, within the meaning of the statute, had not ended at the time of the accident. To cut this car out of the train so that the latter might proceed to its destination was the thing in view, an essential part of the undertaking in connection with which the injuries arose."

Brady v. Terminal R. Association, 303 U. S. 10 (1938) (ptn. 9) clearly involved a stage in the process of moving a defective car to the point of repair. The court says, with respect to this, at page 13:

> "The car had been brought into the yard at Granite City and placed on a receiving track temporarily pending the continuance of transportation. If not found to be defective, it would proceed to destination; if found defective, it would be subject to removal for repairs. It is not a case where a defective car has reached a place of repair. (Citing authorities.) The car in this instance had not been withdrawn from use" (emphasis supplied).

clearly been within the purview of the Safety Appliance Act and that the construction placed upon the Boiler Inspection Act by this case gives the latter Act a narrower scope. The fallacy of this argument is that petitioner assumes that the record in this case shows a temporary stoppage in the course of a continuous use on the line. As can be seen, this does not necessarily follow from the cases cited by petitioner. Assuming, hypothetically, that the grab-iron had been defective, and the repair could have been made at the roundhouse, then, under the cases cited by both petitioner and respondent no liability would have been incurred, since the locomotive would have been already at its point of repair and awaiting the necessary repairs without further use on the line. The instant decision merely applies the settled law to the facts in this case and does not alter the intent or scope of the Boiler Inspection Act.

In **Erie R.R. Co. v. Russell**, 183 Fed. 722 (C.A. 2d 1910) (ptn. 13), a car with a defective knuckle in its coupler had come into the Port Jarvis yard of the defendant as part of its train. Plaintiff's decedent was a member of the switch crew which had started to break up this train. Although, as counsel mentions, the car was scheduled for repairs, the custom in that yard was for the switch crews to replace defective knuckles. The injury occurred on the following day, shortly after the defective car had arrived and during the process of breaking up the train. The court commented at page 724, in the light of these facts: "The insertion of the knuckle was a simple matter. The car was stopped only temporarily, and it was intended to couple it to the other cars as soon as repaired. These facts seem clearly to distinguish this case from those cases cited in the defendant's brief where accidents occurred when cars had been sent to repair shops or placed upon dead tracks used for repair purposes."

Raudenbush v. Baltimore & O.R. Co., 160 F. 2d 363 (C.A. 6th, 1947) (ptn. 16), involved two questions. Plaintiff's decedent was a member of a switch crew making up a train in the yard. After pushing some cars on to a side track the yard engine was uncoupled, backed off about 15 feet and stopped without its headlight on. The cars began to roll because of a slight grade, the engine light was turned on, and decedent climbed aboard the car nearest the engine set its brakes, and slipped on the brake sill which was covered by ice. The Court of Appeals held that the ice on the brake sill was not an unnecessary peril, and then considered the question of whether or not, under an I.C.C. regulation requiring headlights of certain power on yard locomotives, the failure to light the headlight violated the Boiler Inspection Act. In this connection the court considered whether the loco-

There was no jury question in this case.

Petitioner contends (ptn. 19-20) that the exposition of the term "use on its line" might ordinarily be a question of law but was removed from that category by the testimony of petitioner himself that it was still "in use" or "in service." Since the question of ultimate fact in the case would be this question of "in use," any response which petitioner might give to such question would, in fact, invade the province of the jury. It has been held that the couching of a question in such language that legal conclusions necessarily follow therefrom is an improper practice to which does not, and should not, attach the significance desired. (See *American Car and Foundry Co.* v. *Hill*, 226 Ill. 227 (1907); *McCoy* v. *Chicago and A. R.R. Co.*, 268 Ill. 244 (1915); *Smoot* v. *Hollingsworth*, 265 Ill. App. 447 (1932). It is thus clear that under these circumstances to ask an employee of respondent's railroad a question couched in the language of the ultimate fact to be found under the statute, under the guise of calling it a word of art and expert testimony, should not be regarded as an adequate substitute for proper proof to enable the testifying witness to make his own *prima facie*

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motive ceased to be used because it was uncoupled and moved some 15 feet away from the cars. Because of factors much different from those in the instant case, the court concluded the locomotive was in use, saying at pages 367-8: "Here there was an interval of but a few seconds or minutes between the active use of the locomotive and the time of the accident. The locomotive was only some fifteen feet from the cars with which it had just been used and with which it was to be used again at an undetermined time when the other cars arrived, but which arrival was certainly expected. The engineer was still in the locomotive cab and the other crew members were in the vicinity of the cars * * *"

Fort Street Union Depot Co. v. Hillen, 119 F. 2d 307 (C.A. 6th, 1941) (ptn. 15), involved a car which was standing as part of a train which had just arrived in defendant's railroad station and was awaiting removal from the station. It was not in storage. The court held the car in use on the authority of the Brady case, previously discussed.

case. Therefore the Court of Appeals properly held that a jury question did not exist.

II.

The ice on the steps and grab irons of respondent's locomotive was not an "unnecessary peril" under the Boiler Inspection Act.

It is undisputed that locomotive No. 3031 had been in the roundhouse for approximately ten minutes after coming from Omaha on a cold night at the time of the accident. The ice on it had been forming most of the way from Omaha, and was the result of normal weather conditions over which the respondent had no control. The Boiler Inspection Act requires only that the equipment be maintained in such a condition that it may be used in active service on a railroad line without "unnecessary peril to life or limb". It is obvious that, short of suspending the operations of the railroad during cold weather, this condition can not be prevented.

In *Raudenbush* v. *Baltimore & O. R. Co.*, F. (2d) 363, (C.A. 6th, 1947) plaintiff's decedent fell from a freight car as a result of slipping on ice and snow on the sill. The evidence was that the snow had stopped falling about an hour before the accident happened. The Court of Appeals in reversing held that the presence of ice or snow on the gondola sill was not a violation of the Safety Appliance Act.

In *Banta* v. *Union Pacific R. Co.*, ... Mo. ....., 242 S.W. (2d) 34 (1951), the plaintiff, basing his cause of action on the Boiler Inspection Act, sued for injuries sustained when he fell from an icy ladder on the rear of a locomotive tender. A peremptory instruction for plaintiff was

given by the trial court, despite the contention of defendant that the ice was caused by the normal steam from the engine during the winter month. The Court remanded holding that a peremptory instruction was error because, as the Court said at page 42

> "Mere ice or frost or snow upon a ladder which resulted solely from the normal operation of a steam locomotive during existing winter climatic conditions and disconnected from other circumstances would not create liability even under the Boiler Inspection Act".

Another case where the court held that a railroad was not liable for injuries sustained by an employee on account of hazards produced by freshly fallen snow is *McGivern* v. *Northern Pacific Ry. Co.*, 132 F. 2d 213 (C.A. 8th, 1942). There suit was brought to recover for the death of a switchman who fell from a slippery footboard during a time when snow was falling. Plaintiff's theory was that the railroad had not furnished the deceased a safe place in which to work, but the reviewing court pointed out that the railroad is not an insurer of the safety of its employees and that the test is whether reasonable care had been exercised by the employer. The Court concluded that there could be no liability, stating at page 217:

> "Under the prevailing conditions, which were perfectly obvious, snow on the foot-boards could not have been avoided. It was a natural and necessary result of existing climatic conditions."

Although the *McGivern* case was not based upon the Boiler Inspection Act, it is applicable here since the Boiler Inspection Act does not impose a duty to have all engine appurtenances in an absolutely safe condition, but only to keep them in such condition that they may be em-

ployed in active service "without unnecessary peril to life or limb".

Both logically and on the basis of the foregoing authorities, it is impossible that the presence of ice ten minutes after locomotive No. 3031 had entered the roundhouse from a long run on a cold night could be held to be "unnecessary peril" within the meaning of the Boiler Inspection Act.

Although this was not decided by the Court of Appeals, it will sustain the opinion of that court independently of the question presented by the petitioner, since a correct judicial decision will not be disturbed on appeal, even if based on improper grounds (*Cf. Charles E. Harding Co.* v. *Harding*, 352 Ill. 417 (1933); *Rosehill Cemetery* v. *Chicago*, 352 Ill. 11 (1933); *Scoville Mfg. Co.* v. *Cassidy*, 275 Ill. 462 (1917); *Kehoe* v. *Abram*, 210 Ill. 281 (1904); and *Re Grossman*, 175 Ill. 425 (1898). Thus even though petitioner were sustained as to the law on the question presented by him, the ruling of the Court of Appeals would of necessity have to be affirmed, because ice is not unnecessary peril under the circumstances shown on this record.

III.

Lacking any conflict of decisions or inconsistency with the decisions of this Court, the manner in which the factual question here presented was resolved lacks sufficient significance to justify a grant of certiorari.

As has previously been shown, the decision of the Court of Appeals was correct, both for the reason given in the opinion and for the further reason that ice under these circumstances cannot be considered an unnecessary peril within the meaning of the Boiler Inspection Act. It is fur-

ther submitted that the legal principles necessary to the solution of this case are clearly enunciated and well understood by the Courts of Appeals. The many cases bearing directly upon this problem, as cited heretofore, indicate that, despite the protestation of petitioner to the contrary (Ptn. 20), railroads, employees, and the federal courts do know the meaning and limits of the phrase "in use on its line" under the Boiler Inspection Act.

This petition actually seeks to have this Court review the record for the purpose of determining the correctness of the factual ruling of the Court of Appeals that locomotive No. 3031 was not in use on respondent's line at the time of the accident involved. Petitioner asks this Court to go further than applying the correct law to the facts and to adopt his theory that this locomotive was being "temporarily detained" until time for the "resumption of its interrupted trip" from Omaha to Proviso. To adopt this theory would require a careful examination of the record and an application of the identical principles of law applied by the Court of Appeals with a different conclusion as to the significance of the facts.

The question in this case is peculiar to it. Even if decided in favor of petitioner, which is manifestly improper, such a decision would furnish precedent only for the limited factual situation where a locomotive is sitting unattended by its operating crew in a roundhouse after finishing a run and before being taken out on another one. The cases reviewed by this Court in *Wilkerson* v. *McCarthy*, 336 U. S. 63 (1949), indicate that the scope of the Federal Employers' Liability Act, along with the Boiler Inspection Act and Safety Appliance Act, have been thoroughly delineated and correctly settled. Absent a new or different proposition of law with re-

spect to those Acts, the public importance of any one interpretation of facts is negligible since the method of approach prescribed by this Court for this type of problem stands undisturbed, unchallenged, unaltered and, in fact reinforced by the decision of the Court of Appeals in this case.

Conclusion.

For the above and foregoing reasons we respectfully submit that the decision of the Court of Appeals for the Seventh Circuit was manifestly correct and that the question is not of sufficient importance to warrant the granting of certiorari to review a pure question of fact. Accordingly, the petition for writ of certiorari in this case should be denied.

Respectfully submitted,

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OCTOBER TERM, A. D. 1952.

No. 370

JOHN TISNEROS,

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vs.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY OF PETITIONER TO BRIEF OF RESPONDENT.

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I.

This case presents a question of general importance which, although not precisely ruled by any decision of this court, has been decided in such a way as probably to con-

flict with this court's most nearest applicable decisions and clearly so as to conflict with the rationale of decisions in various Courts of Appeals.

Respondent's counsel say in concluding their brief:

> "(T)he question is not of sufficient importance to warrant the granting of certiorari to review a pure question of fact."

Of course, if the Court of Appeals has decided a "pure question of fact", then its decision clearly violates petitioner's right to have that "pure question of fact" decided by a jury under the superintendence of a trial judge who, like the jurors, had seen and heard the witnesses.

However, the Court of Appeals did not decide a "pure question of fact." It either decided a question of *pure law* by holding irrelevant any inferences that might have arisen from the uncertainty as to the time of the locomotive's scheduled resumption of motion, which inferences were material to the question whether the locomotive was in use, or it peremptorily decided a mixed question of law and fact which should have been left to a jury.

Respondent's brief does not avoid the impact of the simple considerations developed in petitioner's brief in support of his application for *certiorari*.

Respondent does not, because it can not, make adequate answer to the propositions that (1) this locomotive was on respondent's line which, of course, means its tracks, and (2) if no one else was "using" the locomotive, petitioner was "using" it when he, as the evidence summarized in petitioner's brief clearly shows, mounted it for the purpose of stoking its fires.

All of the authorities cited by respondent are tersely but effectively distinguished in an appendix to this brief.

Nevertheless respondent's cases are important because they refute respondent's contention that the scope of the Boiler Inspection and Safety Appliance Acts has been "thoroughly delineated and correctly settled" with respect to the question whether cars and locomotives temporarily in rounhouses, in yards or on sidings are "in use" on the carriers' "line". That question, important as to every railroad man who has to work on cars or locomotives temporarily detained for fuelling, watering or other routine conditioning for resumption of motion, should be authoritatively settled by this court's pronouncement.

This question is especially poignant with reference to the "use" of the locomotive when a railroad man on it work on it, not for the purpose of overhauling it, but merely to get it in shape to complete its journey interstate.

We note respondent's fallacy achieved by the use of italics in emphasizing the phrase "active service" as that phrase occurs in the text of the Act. The critical phrase is:

> "* * * that the same *may be* employed in the *active* service of such carrier without unnecessary peril to life or limb * * *" (emphasis supplied).

Once we emphasize the verb "may be" as well as the adjective "active", we see that the purpose of the Act looks toward at least immediate future, as well as present "active" motion. But in any event, we submit that a locomotive that is being fueled is in "active service". The fueling of a locomotive requires the opening and closing of a fire door, which is a motion and "use" of a part of the engine.

These considerations, we submit, demonstrate the moment of the question and they clearly indicate the answer that this court should give to that question.

II.

Respondent's contention that ice and snow on a locomotive is not such an "unnecessary danger" within the purview of the Act does not raise a substantial question, inasmuch this court's decision in Lilly v. Grand Trunk Western R. R. Co., 317 U. S. 481. Controls.

In *Lilly* v. *Grand Trunk Western Railroad Company*, 317 U. S. 481, this Court directly held that a jury may find under the particular circumstances of a case, such as this one, that ice and snow upon a car or locomotive is an "unnecessary danger."

Whether the railroad should have permitted the petitioner to use the locomotive when it was encrusted with dangerous ice and snow was, under the teachings of the *Lilly* case, a question for a jury.

Conclusion.

For the reasons urged in Petitioner's original brief and in this Reply Brief, this Court should grant certiorari and reverse the judgment of the Circuit Court of Appeals in this important case.

Respectfully submitted,

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JAMES A. DOOLEY,
Attorneys for Petitioner.

APPENDIX.

Respondent's authorities on the question of what constitutes "use on a carrier's line analyzed and distinguished.

In *Lyle* v. *A. T. & S. F. Ry. Co.*, 177 Fed. 2d. 221, it appeared that the plaintiff was a hostler's helper. It likewise appeared that the engine had terminated its run and had been removed from service. As was said at page 222 of the opinion:

> "Whether, at the time of the injury, the locomotive was 'in use' or being 'used on its line' depends upon certain undisputed facts. The engine had reached Gainesville and there ended its run. The engineer and fireman had left and the hostler had thereupon taken over, moving the engine eventually to the service track and inspection pit at the roundhouse to be serviced * * * and there turned it over to plaintiff whose duty it was to make the service and to prepare the engine for future further use."

In this case it was pointed out at page 222:

> "There plaintiff completed his duties including as we have seen, placing sand, oil and water in their proper places, filling the lubricators and, in general, doing anything else the engine needed to have done in order to put it in condition for use. He was the only person on or about the inactive, idle locomotive and his complete duty was to service the engine so that it would be in readiness for future use on another run. *Whether there was thereafter, in fact, any such use is not shown by the record.*"

Does this case support defendant's contention? Let us analyze it.

First: In the *Lyle* case the engine had undeniedly completed its run. It had been brought to a roundhouse to be prepared for future use. Here, the engine was en route to the Proviso Yards of the defendant. Indeed, it had been there but a few minutes when plaintiff went on it to see if the fires were burning for this use. Likewise there was no showing by the defendant here that the entire crew had left this particular engine and turned it over to a hostler. Indeed, a defendant who asserts the claim that the engine

was not in use seems in a strange position when it does not produce the crew which brought the engine in and which took the engine to the Proviso Yards. The answer is obvious: namely, that the stop at the roundhouse was but a temporary interruption of the movement of the engine.

Second: In the *Lyle* case, the engine was in the roundhouse *to be serviced and was, in fact, serviced.* The services performed included placing sand, oil and water in their proper place, filling the lubricators and doing anything else the engine needs to have done. The locomotive was in the care of a hostler's helper "whose duty it was to service locomotives with sand, water, fuel or lubricating oil and waste for the journals, and to clean the locomotive of any foreign substance, such as oil or grease on the tender, or elsewhere. In short, to service locomotives and to get them in readiness for use on the road." Page 222, *Lyle* v. *A. T. & S. F. Ry. Co.*, 177 F. 2d. 221.

John Tisneros' job was not to service this locomotive. He had to keep the fires burning so that the engine which had "put in the roundhouse for Proviso" about ten minutes before the accident could complete its journey.

Third: There was no showing in the *Lyle* case as to "whether there was thereafter, in fact, any such use is not shown by the record." Page 222. In other words, in the *Lyle* case it was not shown what was done with the locomotive after the hostler's helper had performed this mechanical work. In the case at bar, the engine went to the Proviso Yards that very day, and on that same day went on to Clinton, Iowa.

Likewise in *Flack* v. *A. T. & S. F. Ry. Co.*, 285 Mo. 28, 224 S. W. 415, 423, (decided in 1920), it appeared that the plaintiff's decedent was a boilermaker. An action was brought under the Federal Employers' Liability Act based on negligence. It was held, first that there was no evidence of negligence causing in whole or in part the death of the decedent, and second that the decedent assumed the risk. After oral argument the plaintiff sought to invoke the Boiler Inspection Act for the first time. The Court disposed of this argument, stating at p. 54 of the opinion:

> "The work then being done was necessary in order to avoid a violation of the provisions of the act whose penalties respondent now invokes."

But certainly this case is not pertinent to this situation.

Indeed, the Court considered the Boiler Inspection Act penal, rather than remedial in nature.

Harlan v. *Wabash Ry. Co.,* 335 Mo. 414, 73 S. W. 2d. 749 (decided in 1934) is expressly overruled in a footnote in the *Lilly* case, see pp. 487-8 of that opinion. There it appeared that the plaintiff, a mechanic's helper was repairing a locomotive. The defect upon which he was working caused the intended run of the locomotive to be abandoned, with the coal in its tender to be removed and the locomotive itself taken to the roundhouse for repairs. While it was there plaintiff fell through a hole in the floor of the engine cab. The Court held that inasmuch as there was no mechanical defect in the cab because the trap door itself operated properly, there could be no recovery. This, of course, is not the law as the *Lilly* case and many others point out.

Be that as it may, the locomotive in that case was being repaired at the time of the occurrence.

In *Compton* v. *Southern Pac. Co.,* 70 Cal. App. 2d 267, 161 P. 2d 40, 46, the plaintiff was a roundhouse employee who was injured while doing repair work on a locomotive withdrawn from service and undergoing repairs—which was not the fact here. The opinion, it might be noted is based on *B. & O. R. Co.* v. *Hooven,* 297 F. 919 (6th Cir.) decided in 1924. In the *Compton* case the Court said:

> "There appears to be no case directly in point interpreting the Boiler Inspection Act, but there are several cases directly in point interpreting the Safety Appliance Act. 45 USCA 1 *et seq.,* which contains language very similar to that used in the Boiler Inspection Act. The leading case is *B. & O. R. R. Co.* v. *Hooven,* 6th Cir., 297 Fed. 919."

In the *Hooven* case the locomotive was withdrawn from service and was undergoing minor repairs in a roundhouse when a roundhouse employee slipped from a running board wherein oil had been left. The *case was not decided on the Boiler Inspection Act,* the action apparently not having been brought under the Act. The plaintiff had prosecuted solely upon the Safety Appliance Act alleging that the defendant had failed to furnish "secure running boards—and secure handholds and grabirons * * *" as the Safety Appliance Act requires. Thus we find the *Harlan* case and the *Hooven* case specifically overruled by the *Lilly* case.

The *Compton* case, based as it was on the *Hooven* case, is without effect.